Supreme Court, U.S.
FILED
SEP 18 1995
CLERK

No. 95-295

In The
Supreme Court of the United States
October Term, 1995

COMANCHE INDIAN TRIBE OF OKLAHOMA, (Plaintiffs)
Petitioners,

v.

THE HONORABLE RICHARD E. HOVIS, THE DISTRICT COURT OF KIOWA COUNTY, OKLAHOMA, (Defendants) and **RHONDA WAHNEE** (Intervenor),
Respondents.

On Petition for A Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENTS' JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GUY HURST*
Assistant Attorney General
4545 N. Lincoln Blvd, Suite 260
Oklahoma City, OK 73105
(405) 521-4274

Attorney for Respondents
Richard E. Hovis and the
District Court of Kiowa County

*Counsel of Record

MICHEAL SALEM*
Salem Law Offices
111 North Peters, Suite 100
Norman, OK 73069
(405) 366-1234
and
SUSAN BUSSEY
Attorney at Law
900 South Berry Road
Norman, OK 73069
(405) 321-8997

Attorneys for Respondent
Rhonda Wahnee

Typography by *The Kinder, Gentler Legal Printing Co.*
Norman, Oklahoma • (405) 321-5453

QUESTIONS PRESENTED

1. Does the statutorily enacted term "court of competent jurisdiction" found in **§1914** of the *Indian Child Welfare Act*, **25 U.S.C. §1901**, *et seq.*, ("ICWA") create "appellate" jurisdiction in the Federal district court over State court juvenile proceedings involving an Indian child, or otherwise repeal or bypass provisions of **28 U.S.C. §1738** which requires federal courts to give "full faith and credit" to final State court determinations?

2. Did the Comanche Tribe's additional claims in **Count II** of its original *Complaint* under the *Oklahoma Child Custody Jurisdiction Act*, **43 Okla. Stat. §501**, *et seq.* ("Okla. UCCJA"), the *Kansas Uniform Child Custody Jurisdiction Act*, **Kan. Stat. Ann. §38-1301** to **§38-1326** ("Kan UCCJA") as well as the *Parental Kidnapping Prevention Act*, **28 U.S.C. §1738A** (PKPA) permit an award of attorneys fees and costs to Respondent Rhonda Wahnee when these statutory enactments contain provisions for and "encourage" awards of attorneys fees to prevailing parties in "appropriate" cases regarding child custody jurisdictional disputes?

LIST OF PARTIES

The parties to this proceeding on *Petition for Writ of Certiorari* are:

Petitioner:

Plaintiffs in the Federal District Court and Appellants in the United States Court of Appeals for the Tenth Circuit (Intervenors in the Kiowa County District Court of the State of Oklahoma and the Comanche Tribal Children's Court):

THE COMANCHE TRIBE OF OKLAHOMA.

Respondents:

Defendants in the Federal District Court, Appellants in the United States Court of Appeals for the Tenth Circuit and Respondents in this proceeding:

RICHARD E. HOVIS, Associate District Judge of the District Court of Kiowa County and THE DISTRICT COURT OF KIOWA COUNTY.

Intervenor in the Federal District Court, Appellant in the United State Court of Appeals for the Tenth Circuit and Respondent in this proceeding (Respondent in the Kiowa County District Court of the State of Oklahoma and the Comanche Tribal Children's Court):

RHONDA WAHNEE.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

CASES v

FEDERAL AUTHORITY v

STATE AUTHORITY v

OTHER AUTHORITY v

PRELIMINARY STATEMENT 1

QUESTIONS PRESENTED 6

STATUTORY PROVISIONS 7

COUNTER-STATEMENT OF THE CASE 9

REASONS FOR DENIAL OF THE WRIT 10

I. THE TENTH CIRCUIT CORRECTLY RULED THAT A FEDERAL DISTRICT COURT MUST GIVE FULL FAITH AND CREDIT TO A STATE COURT'S PRIOR DETERMINATIONS OF ITS

OWN JURISDICTION AND MAY NOT SIT IN "APPELLATE" REVIEW OF THOSE RULINGS. . . 10

II. THE TENTH CIRCUIT DID NOT VIOLATE THE AMERICAN RULE BY AN AWARD OF FEES WHERE THE ORIGINAL COMPLAINT FILED BY THE TRIBE INVOKED PENDENT JURISDICTION UNDER THE OKLAHOMA AND KANSAS UNIFORM CHILD CUSTODY JURISDICTION ACTS, PROVISIONS OF WHICH PROVIDE FOR ATTORNEYS FEES IN "APPROPRIATE" CASES, AND THE FEDERAL PARENTAL KIDNAPPING PREVENTION ACT, AN UNCODIFIED RELATED SECTION OF WHICH ENCOURAGES AWARDS OF FEES IN "APPROPRIATE" CASES. 19

III. CASE LAW SUPPORTS A FEE AWARD AND RHONDA WAS ENTITLED TO FEES SINCE THE DECISION OF THE TENTH CIRCUIT MET THE TEST OF SUBSTANTIALITY ON A COMMON CORE OF FACTS EVEN THOUGH THE COURT NEVER RULED ON THE MERITS OF COUNT TWO. 24

CONCLUSION 29

INDEX OF APPENDICES A-1

TABLE OF AUTHORITIES

CASES **Page**

Allen v. McCurry, 449 U.S. 90, 101 S.Ct. 411,
66 L.Ed.2d 308 (1980) 14-16

Angel v. Bullington, 330 U.S. 183,
67 S.Ct. 657, 91 L.Ed. 832 (1947) 14

City of Cincinnati v. Vester, 281 U.S. 439,
50 S.Ct. 360, 74 L.Ed. 950 (1930) 25

Comanche Indian Tribe of Oklahoma v. Hovis,
53 F.3d 298 (10th Cir., April 18, 1995),
63 U.S.L.W. 2383 ..... 2, 11

Comanche Indian Tribe of Oklahoma v. Hovis,
847 F.Supp. 871 (USDC WD Okla., March 28, 1994) 2

Confederated Tribes of Colville Reservation v.
Superior Court of Okanogan County, 945 F.2d 1138
(9th Cir., 1990) 3

Cromwell v. County of Sac, 94 U.S. 351,
24 L.Ed. 195 (1877) 14, 15

F. D. Rich Co. Inc., v. Industrial Lumber Co.,
417 U.S. 116, 94 S.Ct. 2157, 40 L.Ed.2d 703 (1974) ... 28, 29

Federated Department Stores, Inc. v.
Moitie, 452 U.S. 394, 101 S.Ct. 2424,
69 L.Ed.2d 103 (1981) 14

Hagans v. Lavine, 415 U.S. 528, 94 S.Ct. 1372,
39 L.Ed.2d 577 (1974) 25, 26

Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229,
104 S.Ct. 2321, 81 L.Ed.2d 186 (1984) 25

Kickapoo Tribe of Oklahoma v. Rader,
822 F.2d 1493 (10th Cir., 1987) 3

Kiowa Tribe of Oklahoma v. Lewis, 777 F.2d 587
(10th Cir., 1985) cert. den. 479 U.S. 872,
93 L.Ed.2d 171, 107 S.Ct. 247 (1986) 10, 12

Kremer v. Chemical Const. Corp., 456 U.S. 461,
102 S.Ct. 1883, 72 L.Ed.2d 262 (1982) 15-17

Louisville & N. R.R. v. Garrett, 231 U.S. 298,
34 S.Ct. 48, 58 L.Ed. 229 (1913) 25

Maher v. Gagne, 448 U.S. 122, 100 S.Ct. 2570,
65 L.Ed.2d 653 (1980) 26, 27

Martinez v. United States Olympic Comm.,
802 F.2d 1275 (10th Cir., 1986) 25

McDonald v. Doe, 748 F.2d 1055 (5th Cir., 1984) 27

Mississippi Choctaw v. Holyfield, 490 U.S. 30,
104 L.Ed.2d 29, 109 S.Ct. 1597 (1989) 13

Montana v. United States, 440 U.S. 147,
99 S.Ct. 970, 59 L.Ed.2d 210 (1979) 14, 15

Native Village of Venetie I.R.A. Council v.
State of Alaska, 944 F.2d 548 (9th Cir., 1991) 19

Navajo Nation v. District Court for Utah County,
831 F.2d 929 (10th Cir., 1987) 3

Parklane Hosiery Co. v. Shore, 439 U.S. 322,
99 S.Ct. 645, 58 L.Ed.2d 552 (1979) 15

Plott v. Griffiths, 938 F.2d 164 (10th Cir., 1991) 24, 27

Posadas v. National City Bank, 296 U.S. 497,
56 S.Ct. 349, 80 L.Ed. 351 (1936) 16

Radzanower v. Touche Ross & Co., 426 U.S. 148,
96 S.Ct. 1989, 48 L.Ed.2d 540 (1976) 16

Roman-Nose v. New Mexico Dept. of Human
Services, 967 F.2d 435 (10th Cir., 1992) 19

Santa Fe Industries, Inc. v. Green, 430 U.S. 462,
97 S.Ct. 1292, 51 L.Ed.2d 480 (1977) 13

Schlesinger v. Councilman, 420 U.S. 738,
95 S.Ct. 1300, 420 U.S. 738 (1975) 19

Seaway Drive-In, Inc. v. Township of Clay,
791 F.2d 447 (6th Cir.), cert. den. 479 U.S. 884,
107 S.Ct. 274, 93 L.Ed.2d 251 (1986) 26, 27

Siler v. Louisville & N. R.R., 213 U.S. 175,
29 S.Ct. 451, 53 L.Ed. 753 (1909) 25

Thompson v. Thompson, 484 U.S.174,
98 L.Ed.2d 512, 108 S.Ct. 513 (1988) 22

United Mine Workers of Am. v. Gibbs, 383 U.S. 715,
86 S.Ct. 1130, 16 L.Ed.2d 218 (1966) 25, 26

United States v. United Continental Tuna Corp.,
425 U.S. 164, 96 S.Ct. 1319, 47 L.Ed.2d 653 (1976) 16

Wisconsin Hosp. Ass'n v. Reivitz, 820 F.2d 863
(7th Cir., 1987) 27

FEDERAL AUTHORITY

25 U.S.C. §1901, et seq.,
Indian Child Welfare Act 3, 6, 12, 18-20, 23

25 U.S.C. §1911 ..... 3, 14, 20

25 U.S.C. §1911(a) 4, 5

25 U.S.C. §1911(b) 4, 17

25 U.S.C. §1911(d) 20

25 U.S.C. §1912 ..... 3, 14

25 U.S.C. §1913 ..... 3, 14

25 U.S.C. §1914 ..... 3, 6, 12, 13, 18, 19, 29

28 U.S.C. §1257 ..... 4, 13

28 U.S.C. §1331 . . . . . 19, 20

28 U.S.C. §1362 20

28 U.S.C. §1738 . . . . . 6, 11, 14-18, 29

28 U.S.C. §1738A, Parental Kidnapping Protection Act 5-8, 21-24

40 U.S.C.A. §§270a, et seq., Miller Act 28

42 U.S.C. §1988 26

Fed. Rul. Civ. Proc. 54 20

Public Law 96-611, §8(c) 8

Rule 10.1 of the Rules of the Supreme Court of the United States 2

§104 of Public Law 95-608 (25 U.S.C. §1914) 18

STATE AUTHORITY

10 Okla. St. Ann. §1601 - 1628 (Renumbered to 43 Okla. Stat. §501 - 528) 7

10 Okla. Stat. §1609 (Renumbered to 43 Okla. Stat. §509) 7

43 Okla. Stat. §501, et seq., Oklahoma Uniform Child Custody Jurisdiction Act 6, 7, 20

43 Okla. Stat. §509(G) 7

Kan. Stat. Ann. §38-1301 to §38-1332, Kansas Uniform Child Custody Jurisdiction Act, ... 6, 7, 21

Kan. Stat. Ann. §38-1307(G) 7

Kan. Stat. Ann. §38-1326 21

Kan. Stat. Ann. §38-1327 21

Kan. Stat. Ann. §38-1334 21

Kan. Stat. Ann. §38-1335 21

OTHER AUTHORITY

13B C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure Sec. 3564 (2d ed., 1984) 25

House Report (Interior and Insular Affairs Committee) No. 95-1386, (July 24, 1978 [To accompany H.R. 12533] 1978 U.S. Code, Congressional and Administrative News, p. 7530 18

Public Law 95-608, 1978 U.S. Code, Congressional and Administrative News, p. 7530 18

Senate Report (Indian Affairs Committee), No. 95-597, November 3, 1977 [To accompany S. 1214], 1975 U.S. Code, Congressional and Administrative News, p. 7530 18

No. 95-295

In The

Supreme Court of the United States

October Term, 1995

COMANCHE INDIAN TRIBE OF OKLAHOMA, (Plaintiffs)
Petitioners,

v.

THE HONORABLE RICHARD E. HOVIS, THE DISTRICT COURT OF KIOWA COUNTY, OKLAHOMA, (Defendants) and **RHONDA WAHNEE** (Intervenor),
Respondents.

RESPONDENTS' JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

THE HONORABLE RICHARD E. HOVIS, THE DISTRICT COURT OF KIOWA COUNTY, OKLAHOMA and RHONDA WAHNEE,[1] Respondents, come before this

[1]All Respondents submit this single joint Brief in opposition of the *Petition for Writ of Certiorari* filed by the Comanche Tribe. Respondents have associated, yet distinct and separate interests on appeal.

Respondents HOVIS and THE DISTRICT COURT (Defendants-Appellants in the Federal district court) resist the federal court's judgment to protect its jurisdiction and the finality of its judgments.

(continued...)

Court and respectfully request that this Court deny the *Petition for Writ of Certiorari* which seeks review of the Tenth Circuit's opinion. That opinion is reported as *Comanche Indian Tribe of Oklahoma v. Hovis*, 53 F.3d 298 (10th Cir., April 18, 1995), 63 U.S.L.W. 2383 and is reprinted in the *Petition* at **Appendix A**. The Federal District Court decision is reported as *Comanche Indian Tribe of Oklahoma v. Hovis*, 847 F.Supp. 871 (USDC WD Okla., March 28, 1994) and is reprinted in the *Petition for Certiorari* at **Appendix D.**

This case, as decided by the Tenth Circuit, is a straightforward application of the rules of "full faith and credit" and "collateral estoppel." There is no need to accept the Tribe's invitation to strike out on a judicial cross-country across new territory whose result would cut a swath of new rules altering the important and essential requirements of "full faith and credit" by unnecessary relitigation of state court judgments.

As such, this case falls wide of the requirements of this Court's **Rule 10.1**, because, although this Court has never addressed the exact issues raised by Petitioner's claim, the exact question decided by the Tenth Circuit is not in critical division in the Circuit courts, nor is there any serious departure from

---

[1](...continued)

Intervenor RHONDA WAHNEE (Intervenor-Appellant in the Federal district court proceedings) seeks protection of her right to object to an illegal and inappropriate transfer from the State District Court to the Tribal Court as well as the denial of her right of due process in the original state court proceeding and the subsequent tribal court proceedings.

However, as a result of the submission of a joint brief, critical comments regarding the positions of the litigants, the Comanche Tribe or Comanche Tribal Court procedures should not be referenced to Respondent HOVIS, but instead should be considered as attributable only to Respondent WAHNEE.

accepted principles that requires the superintending force of this Court.[2]

Stated another way, if the Comanche Tribe's theory is correct, the mere recitation of the term, "court of competent jurisdiction" found in **25 U.S.C. §1914** is a grant of "appellate" jurisdiction to Federal district courts over final state court decisions simply because those proceedings involve Indian children. There is no indication Congress intended such a grant of jurisdiction in the *Indian Child Welfare Act*, **25 U.S.C. §1901**, *et seq.* ("ICWA").

Instead, the more logical consideration is that the authority Congress gave to the Indian tribes and others in **§1914** to ". . . petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of section 1911, 1912 and 1913" meant that a "court of competent jurisdiction" is the appropriate appellate court of the state. The only Federal court that has direct appellate status of

---

[2]Other federal litigation that has addressed the question of a collateral attack of a State court determination of its jurisdiction have reached results consistent with this case. See *Kickapoo Tribe of Oklahoma v. Rader*, 822 F.2d 1493, 1501 (10th Cir., 1987)(Tribe's federal suit challenging adoption under *Indian Child Welfare Act* (ICWA) barred under Oklahoma doctrine of res judicata); *Confederated Tribes of Colville Reservation v. Superior Court of Okanogan County*, 945 F.2d 1138, 1141 (9th Cir., 1990)(Federal court did not have jurisdiction over declaratory judgment action brought by tribe against state court to determine jurisdiction over custody dispute involving parents who were not represented in the declaratory judgment action where the declaratory judgment sought by the tribe was a de facto horizontal appeal from the state trial court); *Navajo Nation v. District Court for Utah County*, 831 F.2d 929, 930-1 (10th Cir., 1987)(Determination of issue of jurisdiction by State Supreme Court mooted collateral federal suit for declaratory judgment). However, Federal courts can have jurisdiction to address questions arising under the ICWA. See Footnote 16.

state court proceedings is this Court, by way of the federal statute granting this Court jurisdiction to review "final judgments or decrees rendered by the highest court of a state in which a decision could be had." **28 U.S.C. §1257** The Tribe gave the Supreme Court of the State of Oklahoma no opportunity to correct the "error", if any, of the lower court.

While the Petitioner Tribe now comes before this Court alleging injury to its sovereignty because the Respondent State Court vacated its original order of transfer, the Tribe failed to emphasize that the juvenile proceedings resided in the Kiowa County District Court for over a year before the Comanche Tribe sought transfer to its Tribal Children's Court. During that time, the State Court adjudicated its own jurisdiction and found that Kristy Wahnee and Rhonda, her mother, were properly before that Court because they were residents of Kiowa County.[3] As such, the State District Court at least had concurrent jurisdiction under **25 U.S.C. §1911(b)**. When the Tribe first sought a transfer, Rhonda indicated her objection to any such transfer.[4] Under **§1911(b)**, the case would have stayed in the State Court. Instead, the Tribe came to the district court and procured a *ex parte* order of transfer to Tribal

---

[3]The original *Juvenile Petition* filed on May 6, 1986 recited that Kristy resided in Mountain View, Oklahoma. (See **Appendix A**) This matter was adjudicated as true and the State Court determined it had jurisdiction on June 16, 1986. (See **Appendix B**)

However, both the Tribal Court and the Federal District Court each subsequently "re-determined" Kristy was a resident on Indian land and that jurisdiction was exclusive in the Tribal Court under **25 U.S.C. §1911(a)**.

[4]Rhonda's oral objection in the State District Court opposing the suggestion that the case transfer to Tribal Court is memorialized on the judgment roll by *Court Minute* dated May 27, 1987. (See **Appendix C**)

Court without notice to Rhonda or a hearing.[5] As such, the transfer order was void *ab initio*. After Rhonda filed a *Motion to Vacate*, the State District Court retrieved its jurisdiction. The Tribal Court's and the Federal District Court's later determinations of jurisdiction pursuant to **§1911(a)** were contrary to the prior ruling of the State Court.

Finally, the Tenth Circuit properly awarded attorneys fees and costs to Respondent Rhonda Wahnee. Contrary to the Tribe's suggestion that the award of fees was in violation of the "American Rule," **there was** a statutory basis for fees. An examination of the argument advanced by Rhonda in her application for fees and costs makes it clear that the award of fees was sought pursuant to Oklahoma and Kansas law under their respective *Uniform Child Custody Jurisdiction Acts*, both of which were invoked as claims by the Comanche Tribe in **Count Two** of its original *Complaint* (See *Petition*, p. F-11) Each of these State statutory provisions provide for attorneys fees to prevailing parties in "appropriate cases."

The Tribe also invoked a claim under the Federal *Parental Kidnapping Protection Act*, **28 U.S.C. §1738A** ("PKPA") in **Count Two**. The PKPA does not provide an independent grant of federal jurisdiction. There is an uncodified statutory section enacted as a part of the PKPA in which Congress encouraged the award of attorneys fees in proceedings where prior court jurisdictional decisions are unnecessarily relitigated in a different forum. This is a situation directly applicable to the instant case.

---

[5]The *Motion to Transfer* was filed on June 9, 1987. The Tribe obtained an *ex parte Order to Transfer* on June 11, 1987. These are reproduced as **Appendices D** and **E**) There is nothing on the face of the judgment roll that reflects that any notice was issued nor any hearing set to formally adjudicate the Tribe's transfer request.

QUESTIONS PRESENTED

1. Does the statutorily enacted term "court of competent jurisdiction" found in **§1914** of the *Indian Child Welfare Act*, **25 U.S.C. §1901**, *et seq.*, ("ICWA") create "appellate" jurisdiction in the Federal District Court over State court juvenile proceedings involving an Indian child, or otherwise repeal or bypass provisions of **28 U.S.C. §1738** which requires federal courts to give "full faith and credit" to final State court determinations?

2. Did the Comanche Tribe's additional claims in **Count II** of its original *Complaint* under the *Oklahoma Child Custody Jurisdiction Act*, **43 Okla. Stat. §501**, *et seq.* ("Okla. UCCJA"), the *Kansas Uniform Child Custody Jurisdiction Act*, **Kan. Stat. Ann. §38-1301** to **§38-1326** ("Kan UCCJA") as well as the *Parental Kidnapping Prevention Act*, **28 U.S.C. §1738A** (PKPA) permit an award of attorneys fees and costs to Respondent Rhonda Wahnee when these statutory enactments contain provisions for and "encourage" awards of attorneys fees to prevailing parties in "appropriate" cases regarding child custody jurisdictional disputes?

STATUTORY PROVISIONS

Oklahoma Child Custody Jurisdiction Act, **43 Okla. Stat. §501**, *et seq.* (Okla. UCCJA)

43 Okla. Stat. §509(G):[6]

> (G) If it appears to the court that it is clearly an inappropriate forum it may require the party who commenced the proceedings to pay, in addition to the costs of the proceedings in this state, necessary travel and other expenses, including attorneys' fees, incurred by other parties or their witnesses. Payment is to be made to the clerk of the court for remittance to the proper party.

Kansas Uniform Child Custody Jurisdiction Act, **Kan. Stat. Ann. §38-1301** *et seq.* (Kan. UCCJA).

Kans Stat. Ann. §38-1307(G):

> This statutory provision is identical to **43 Okla. Stat. §509(G)**.

Parental Kidnapping Prevention Act, Title **28 U.S.C. §1738A**[7]

---

[6]This was renumbered from **10 Okla. Stat. §1609**. The Comanche Tribe recited **10 Okla. St. Ann. §1601-1628** as the Okla UCCJA in its *Complaint*. However, the Okla UCCJA was renumbered in September of 1990, over two years prior to the filing of Plaintiff's *Complaint*.

[7]The full text of **§1738A** is set out in **Appendix H**.

The following is an uncodified statute identified as **Section 8(c)** of **Pub.L. 96-611** and associated with **§1738A**:

> In furtherance of the purposes of **§1738A** of title **28**, United States Code [this section], as added by subsection (a) of this section, State courts are encouraged to--
>
> (1) afford priority to proceedings for custody determinations; and
>
> (2) award to the person entitled to custody or visitation pursuant to a custody determination which is consistent with the provisions of such **§1738A** [this section], necessary travel expenses, attorneys' fees, costs of private investigations, witness fees or expenses, and other expenses incurred in connection with such custody determination in any case in which--
>
> (A) a contestant has, without the consent of the person entitled to custody or visitation pursuant to a custody determination which is consistent with the provisions of such **§1738A** [this section], (i) wrongfully removed the child from the physical custody of such person, or (ii) wrongfully retained the child after a visit or other temporary relinquishment of physical custody; or
>
> (B) the court determines it is appropriate.

COUNTER-STATEMENT OF THE CASE

Respondents do not agree that the statement of the case presented by the Tribe is an accurate and complete identification of the necessary factual predicates to this case.

The Tenth Circuit's recitation of facts is an reliable statement of those facts necessary to its decision. However, because the fee application came postjudgment, that recitation is lacking of some the extraordinary actions of the Tribe to hinder Rhonda's efforts to obtain a return of Kristy which made this an "appropriate" case for an award of fees.

These factual predicates were more fully developed in the proceedings before the Tenth Circuit and have been briefly alluded to, in part, in the *Preliminary Statement*.

Rhonda contends the record clearly details numerous instances of the Tribe's efforts to prevent the return of Kristy to her or to even obtain occasional visitation. Although not entirely relevant to the argument in this Court, besides obtaining the *ex parte* order of transfer, refusing to conclude adjudication of the proceeding long after Rhonda left the abusive boyfriend who originally caused injury to Shannon,[8] and acted to shut down the Tribal Court as a means of preventing continued hearings on the restoration of Rhonda's custody[9], the Tribal Court continued to make findings that

---

[8]As the Tenth Circuit noted in Footnote 3 of its opinion, the Tribe failed conclude a final adjudication of Rhonda's parental rights after several hearings over three and one-half years and indefinitely continued all court cases on its own motion. (*Petition*, **Append.**, p. A-4)

[9]The Tribal Court considered a trial placement of Kristy with Rhonda to which Blanche objected. The Tribal Court then reversed itself and eventually shut down its operation after Blanche met with Tribal Business Committee. (See **Appendix G**)

efforts to reunite the family "have failed" even after it agreed to a trial placement of Kristy with Rhonda and despite Rhonda's compliance with the Service Plan. More astonishingly, the Tribal Court referenced on several occasions in its journal entries, a speech impediment of Rhonda's that caused her to stutter. There was no explanation by the Tribal Court of the relationship of the impediment to Rhonda's fitness to parent her child.

Finally, the appropriateness of the fee award was also justified by the Tribe's refusal to acknowledge longstanding precedent within the Tenth Circuit decided adversely to the Tribe's position in its *Complaint*. See *Kiowa Tribe of Oklahoma v. Lewis*, 777 F.2d 587 (10th Cir., 1985) *cert. den.* 479 U.S. 872, 93 L.Ed.2d 171, 107 S.Ct. 247 (1986) The Comanche Tribe was on notice of such precedent since the official reporter shows the Tribe participated as *amicus curiae* before the Tenth Circuit. Despite this prior knowledge, there was no action by the Tribe to recognize this existing precedent or advance any good faith argument for its reversal in its original *Complaint*.

REASONS FOR DENIAL OF THE WRIT

I. THE TENTH CIRCUIT CORRECTLY RULED THAT A FEDERAL DISTRICT COURT MUST GIVE FULL FAITH AND CREDIT TO A STATE COURT'S PRIOR DETERMINATIONS OF ITS OWN JURISDICTION AND MAY NOT SIT IN "APPELLATE" REVIEW OF THOSE RULINGS.

The Tenth Circuit never reached the question of whether a federal court is a "court of competent jurisdiction" to

determine the appropriate jurisdiction for custody proceedings involving an Indian child.[10] Instead, the panel focused on whether the federal court was required to give "full faith and credit" to the those determinations of jurisdiction in the State Court.

In Part II of its opinion, the Tenth Circuit began by considering its own jurisdiction, as any Federal court must do[11] It concluded that the obligation of a Federal court to grant full faith and credit precluded redetermination of the State court's jurisdiction. It applied the rules of collateral estoppel of Oklahoma, as it is obligated to do under **28 U.S.C. §1738**. The Court found an identity between the parties and the issues and this conclusively precluded relitigation in Federal court. The Tribe did not appeal the final decision.[12]

---

[10] See *Comanche Tribe v. Hovis*, (*Petition*, p. A-14-15):

> The question before us is not whether the federal district court is a "court of competent jurisdiction." Rather the question is whether the Tribe can institute an action in federal district court after it has lost in state court following full consideration, briefing, and argument on the identical issue of fact and law relating to jurisdiction to terminate parental rights.

[11]The Comanche Tribe incorrectly transcribed the opinion of the Tenth Circuit in **Appendix A** of the *Petition*. The heading "**Part II**" is omitted on Page A-10 from where it appears in the original *Memorandum Opinion*. (This can be shown by comparison to the original slip opinion reproduced at 1995 WL 229575 *4 or 53 F.3d at 302) Additionally, **Footnote 6** is misplaced from its location in the original opinion under **Part II** and its text is erroneously duplicated in the body of the text of the opinion as well as in the footnote incorrectly placed at the end of that duplicated text.

[12]An appeal was taken to the Oklahoma Supreme Court by Blanche and that Application to Assume Original Jurisdiction was denied. See **Appendix F**. (Excerpt of Order of Oklahoma Supreme Court dated September 24, 1991)

But the Comanche Tribe would not hold this so. Its theory is that they may intervene in a State court proceeding, litigate until they are dissatisfied with that result, abandon the normal state court appellate procedures implicit in a result with which they disagree and go elsewhere for a review of the State Court determination because the Federal district court is entitled to "referee" that previously decided determination.

Contrary to any assertion of the Comanche Tribe, there is no suggestion in the *Indian Child Welfare Act* that the phrase "court of competent jurisdiction" found in **25 U.S.C. §1914** grants Federal courts the right or opportunity to sit in "appellate" status of state court determinations. If Congress had chosen to provide that federal review procedure, it would have explicitly stated as much because federal courts, as courts of limited jurisdiction, cannot presume such a review exists.

The path the Tenth Circuit followed to this result was based upon its prior precedent in *Kiowa Tribe of Oklahoma v. Lewis*, 777 F.2d 587 (10th Cir., 1985) *cert. den.* 479 U.S. 872, 93 L.Ed.2d 171, 107 S.Ct. 247 (1986) At that time, this Court chose not to accept *Kiowa Tribe* on certiorari. In the past ten years since *Kiowa Tribe* was decided, Congress has not seen fit to modify the statute upon which the holding is based. Nor does the Tribe cite any cogent argument that even persuasively suggests the question they raise is any more susceptible to consideration now that it was over ten years ago.

Kiowa Tribe raises a similar question to the instant case. As the Tenth Circuit points out:

> . . . the Tribe moved to intervene in a Kansas state district court proceeding where a non-Indian couple petitioned for adoption of a child enrolled as a member of the Tribe. After considering briefs filed by the Tribe and the couple, the state district court held that the ICWA did not apply

and denied the Tribe's motion to intervene on that basis. The Tribe appealed the denial of its motion to intervene to the Kansas Supreme Court, where the court considered briefs and entertained oral argument by counsel for the Tribe and other interested parties. The Kansas Supreme Court affirmed the state district court's judgment that the ICWA was inapplicable.

Comanche Tribe v. Hovis, (10th Cir.) (*Petition*, **Append**. p. A-15)

The Kiowas did not proceed to this Court, which has jurisdiction by virtue of federal statute. *See* **28 U.S.C. §1257** Indeed, this was the successful path that the Mississippi Choctaw Indians took in *Mississippi Choctaw v. Holyfield*,[13] 490 U.S. 30, 104 L.Ed.2d 29, 109 S.Ct. 1597 (1989)

The Comanche Tribe did not test the waters of appellate jurisdiction in the Oklahoma Supreme Court. It chose, instead, to turn to the Federal courts and now argues, belatedly, that the Federal courts are entitled to such review under **§1914**. The Tribe should just say no.

The starting point in construing a statute is the language of the statute itself. *E.g.*, *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 477, 97 S.Ct. 1292, 1303, 51 L.Ed.2d 480 (1977).

§1914 of the **ICWA** provides:

Any Indian child who is the subject of any action for foster care placement or termination of parental rights under

---

[13]Because *Mississippi Choctaw* was an appeal from a state supreme court decision, contrary to any assertion of the Tribe, it does not instruct regarding any theory that allows the Federal district court to "referee" jurisdictional disputes between state and tribal courts.

> State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of section **1911**, **1912**, and **1913** of this title.

Nothing about this section suggests that Congress intended to repeal or displace the normal rules of "full faith and credit" required by **28 U.S.C. §1738**. Yet, it is consistent to suggest there are courts of competent jurisdiction that can review the State court's decision and those are found in the normal appellate procedures of the State and, eventually, this Court.

§1738 requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged:

> . . . the federal courts consistently have applied res judicata and collateral estoppel to causes of action and issues decided by state courts. *Allen v. McCurry*, 449 U.S. 90, 96, 101 S.Ct. 411, 416, 66 L.Ed.2d 308 (1980); *Montana v. United States*, 440 U.S. 147, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979); *Angel v. Bullington*, 330 U.S. 183, 67 S.Ct. 657, 91 L.Ed. 832 (1947). Indeed, from *Cromwell v. County of Sac*, 94 U.S. 351, 24 L.Ed. 195 (1877), to *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981), this Court has consistently emphasized the importance of the related doctrines of res judicata and collateral estoppel in fulfilling the purpose for which civil courts had been established, the conclusive resolution of disputes within their jurisdiction. Under res judicata, a final judgment on the merits of an action precludes the

parties or their privies from relitigating issues that were or could have been raised in that action. *Allen v. McCurry*, *supra*., at 94, 101 S.Ct., at 414; *Cromwell v. County of Sac*, *supra*., at 352. Under collateral estoppel, once a court decides an issue of fact or law necessary to its judgment, that decision precludes relitigation of the same issue on a different cause of action between the same parties. *Montana v. United States*, *supra*., at 153, 99 S.Ct., at 973. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326, n. 5, 99 S.Ct. 645, 649, n. 5, 58 L.Ed.2d 552 (1979). Thus, invocation of res judicata and collateral estoppel "relieve[s] parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, and, by preventing inconsistent decisions, encourage[s] reliance on adjudication." *Allen v. McCurry*, 449 U.S., at 94, 101 S.Ct., at 414. When a state court has adjudicated a claim or issue, these doctrines also serve to "promote the comity between state and federal courts that has been recognized as a bulwark of the federal system." *Id*., at 96, 101 S.Ct., at 416.

> *Kremer v. Chemical Const. Corp.*, 456 U.S. 461, 465 at Footnote 6, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982)

Kremer is perfectly illustrative of the correctness of the Tenth Circuit's decision. In *Kremer*, the Petitioner argued that Title VII formed a basis to relieve federal courts of the preclusive effect of **§1738** and that even if Title VII did not, the administrative and judicial procedures of New York were so deficient that they were not entitled to the preclusive effect of a final judgment. This Court rejected both of those suggestions:

Allen v. McCurry, 449 U.S. 90, 99, 101 S.Ct. 411, 417, 66 L.Ed.2d 308 (1980), made clear that an exception to **Sec. 1738** will not be recognized unless a later statute contains an express or implied partial repeal. There is no claim here that Title VII expressly repealed **Sec. 1738**; if there has been a partial repeal, it must be implied. "It is, of course, a cardinal principle of statutory construction that repeals by implication are not favored," *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154, 96 S.Ct. 1989, 1993, 48 L.Ed.2d 540 (1976); *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 168, 96 S.Ct. 1319, 1322, 47 L.Ed.2d 653 (1976), and whenever possible, statutes should be read consistently. There are, however,

> " 'two well-settled categories of repeals by implication--(1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But, in either case, the intention of the legislature to repeal must be clear and manifest. ...' " *Radzanower v. Touche Ross & Co. supra.*, at 154, 96 S.Ct., at 1993, quoting *Posadas v. National City Bank*, 296 U.S. 497, 503, 56 S.Ct. 349, 352, 80 L.Ed. 351 (1936).

Kremer, 456 U.S. at 468.

Title VII did not fit either of these exceptions of repeal by implication even though federal courts were entrusted with ultimate enforcement responsibility.[14]

Title VII also did not require claimants to pursue state court proceedings nor did it spell out the weight that federal courts were to give to those state determinations. Even though EEOC was, by statute, required to give "substantial weight" to those determinations, this was ". . . only the minimum level of deference the EEOC must afford all state determinations." See *Kremer*, 456 U.S. at 470. It did not suggest a de novo review.

The application of such a "dual standard of review" in the instant case would give rise to the same anomaly presented in *Kremer*:

> To suggest otherwise, to say that either the opportunity to bring a "civil action" or the "substantial weight" requirement implicitly repeals **Sec. 1738**, is to prove far too much. For if that is so, even a full trial on the merits in state court would not bar a trial de novo in federal court and would not be entitled to more than "substantial weight" before the EEOC. The state courts would be placed on a one-way street; the finality of their decisions would depend on which side prevailed in a given case.
>
> *Kremer*, 456 U.S. at 470.

---

[14]Of course, in the instant case, **§1911(b)** makes it clear that State courts have concurrent jurisdiction, thereby strengthening the argument their decisions have preclusive effect since State court involvement was clearly part of the overall scheme envisioned by Congress.

Just as there is no explicit language of a repeal of the effect of **§1738**, there is also nothing about **§1914** that suggests an implied partial repeal.

Even if there is an arguable claim of ambiguity that suggests we look to the legislative history, there is nothing about that history that mitigates in favor of an explicit or implied repeal.[15] **§1914** began as **§104** of **Public Law 95-608**. The sum total of the legislative comments of **House Report 95-1386** regarding **§104** (**§1914**) are as follows:

> Section 104 authorizes the child, parent, or Indian custodian, or the tribe to move to set aside any foster care placement or termination of parental rights on the grounds that the rights secured under section 101, 102, or 103 were violated.
>
> **95 U.S. Congressional and Administrative News** at 7546

This is hardly a ringing endorsement of precedent for uprooting of the finality of state court decisionmaking.

In short, the Tenth Circuit's decision is appropriate in its application of **§1738** and **§1914** is not authority for its partial repeal.[16]

---

[15]The legislative history consists of the following reports: **Senate Report** (Indian Affairs Committee), No. 95-597, November 3, 1977 [To accompany S. 1214] and **House Report** (Interior and Insular Affairs Committee) No. 95-1386, (July 24, 1978 [To accompany H.R. 12533]. Cong. Record Vol. 123 (1977) and Cong. Record Vol. 124 (1978). See Public Law 95-608, **1978 U. S. Code Congressional and Administrative and Congressional News**, p. 7530.

[16] Federal courts, however, can exercise jurisdiction under the ICWA

(continued...)

II. THE TENTH CIRCUIT DID NOT VIOLATE THE AMERICAN RULE BY AN AWARD OF FEES WHERE THE ORIGINAL COMPLAINT FILED BY THE TRIBE INVOKED PENDENT JURISDICTION UNDER THE OKLAHOMA AND KANSAS UNIFORM CHILD CUSTODY JURISDICTION ACTS, PROVISIONS OF WHICH PROVIDE FOR ATTORNEYS FEES IN "APPROPRIATE" CASES, AND THE FEDERAL PARENTAL KIDNAPPING PREVENTION ACT, AN UNCODIFIED RELATED SECTION OF WHICH ENCOURAGES AWARDS OF FEES IN "APPROPRIATE" CASES.

---

[16](...continued)
in appropriate circumstances. See *Roman-Nose v. New Mexico Dept. of Human Services*, 967 F.2d 435, 437 (10th Cir., 1992)(State court adoption decree could not be collaterally attacked by habeas corpus, but district court had jurisdiction under **§1914** over mother's pro se complaint challenging termination of parental rights as violation of ICWA); *Native Village of Venetie I.R.A. Council v. State of Alaska*, 944 F.2d 548, 552 (9th Cir., 1991)(District court had **28 U.S.C. §1331** jurisdiction under ICWA to force State of Alaska to give full faith and credit to adoption decrees entered by governing body of federally recognized native villages) However, there can be other reasons which counsel that the federal court withhold consideration of the jurisdictional issues brought before it. See *Schlesinger v. Councilman*, 420 U.S. 738, 754-5, 95 S.Ct. 1300, 420 U.S. 738 (1975)(Action by a Federal district court to enjoin **prejudgment court martial proceedings** was within general federal question jurisdiction of the district court, but that other prudent considerations regarding the exercise of equitable jurisdiction dictated that the federal court withhold action).

The holdings of these cases are not inconsistent with the Tenth Circuit's decision in the instant case because they do not permit relitigation of existing state court determinations.

After conclusion of the proceedings in the Circuit, Rhonda moved for an award of attorneys fees and costs in the appellate court. While the Tribe claims the Tenth Circuit's fee award was in violation of the "American Rule," it is simply not true that no statutory basis existed for the fee award.[17] The Tribe itself set the stage for a fee award by invoking state statutes that provided for fee awards in **Count Two** of its *Complaint*.

If the Tribe wanted an explanation for the Circuit's award of fees, it need look no further than the *Application for Fees, Costs and Expenses* filed by Intervenor Wahnee in the Tenth Circuit. The following brief synopsis of that argument supports the Tenth Circuit's decision.

The Comanche Tribe invoked federal jurisdiction pursuant to **28 U.S.C. §1331** (federal question) and **28 U.S.C. §1362** (Indian tribe federal question) and asserted claims under **25 U.S.C. §1901** and **1911(d)**. (*Petition*, **Append.**, p. F-2)

The Tribe made claims under two counts. The **First Count** alleged a cause of action under the **Indian Child Welfare Act, 25 U.S.C. §1911** *et seq.* and sought declaratory and injunctive relief against Defendant Hovis and the District Court. (*Petition*, **Append.** p. F-2, F-8-9)

The **Second Count** sought declaratory judgment and injunctive relief under alternative theories of action based upon the following federal and state statutes:

1. *Oklahoma Uniform Child Custody Jurisdiction*, **10 Okla. Stat. §1601-28** (Oklahoma UCCJA);[18]

---

[17]Of course, under **Fed. Rul. Civ. Proc. 54**, costs could be awarded as a matter of course, regardless of the existence of other statutory authority.

[18]The *Oklahoma Child Custody Jurisdiction Act* was renumbered to **43 Okla. Stat. §501**, *et seq.* effective September, 1990, over two years prior to the filing date of the Tribe's original *Complaint* on October 28, 1992.

2. *Kansas Child Custody Jurisdiction Act*, **Kan. Stat. Ann. §38-1301** to **§38-1326** (Kan. UCCJA).[19]

3. *Parental Kidnapping Prevention Act*, **28 U.S.C. §1738A** (PKPA);

By pleading each of these claims, the Comanche Tribe submitted itself to federal jurisdiction to the extent of the claimed causes of action they asserted. Each of the state statutory provisions alleged as pendent claims contains a provision for attorneys fees in "appropriate" cases. Rhonda contended that this was just such an appropriate case.

Why? There is no simply no issue relevant to a claim under these three statutory provisions that carries any significant question involving the *Indian Child Welfare Act*. Instead, Rhonda contends that the Tribe included these issues as the alter ego of Blanche Wahnee, paternal aunt of Kristy, who was awarded temporary custody of the child by both the State District Court and the Tribal Court.[20]

---

[19]Plaintiff did not cite the following additional provisions included under the Kansas version of the Uniform Statues: **Kan. Stat. Ann. §38-1326. Short Title; Kan. Stat. Ann. §38-1335. Continuation of jurisdiction until assumed by other state**. **Kan. Stat. Ann. §38-1327** to **§38-1334** are reserved under the Kansas statutory scheme.

[20]Before any altruistic motives of the Tribe seeking a "just" determination of jurisdiction are firmly cemented in place, one must ask: What possible relationship can there be of the alternative request for transfer to a Kansas court to the claimed singular interest of settling a question of jurisdiction under the ICWA? What significant issue of Native American Law or folklore would be preserved by transferring this case to Kansas except, perhaps, an effort to raise the ante to Rhonda so as to add an additional obstacle to Rhonda in getting her child back.

(continued...)

The Tribe now claims Count Two did not assert "pendent state claims." Instead, they say, **28 U.S.C. §1738A** was the true basis of their claim and references to state child custody jurisdiction statutes were "definitional" in nature and not merely assertive of a claim under state law. (*Petition*, p. 17-18)

If words are to have their ordinary meaning, it is disingenuous to argue that Count Two does not means what it, in fact, says. Nor is it reasonable to assert that **§1738A** preempts state law when, in fact, it is virtually identical, if not in wording, then in effect, to the state statutes the Tribe claims are "preempted." (See **Appendix H**)

Why would the Tribe even "define" the **Kansas UCCJA** or ask for a transfer of jurisdiction to Kansas if it was not asserting a claim on Blanche's behalf, who resided in Lawrence, Kansas during the school year. The Kansas Act would not otherwise be applicable to a controversy arising between the Oklahoma district court and the tribal court unless there was consideration of a separate claim on Blanche's behalf.

While it may be true that **28 U.S.C. §1738A** preempts state law to the extent that these state laws are contrary to its provisions, which they do not appear to be in relevant part, **§1738A** does not have an independent basis for federal jurisdiction. In *Thompson v. Thompson*, 484 U.S.174, 98 L.Ed.2d 512, 108 S.Ct. 513 (1988), this Court held **§1738A** does not create an implied cause of action in federal court to determine which of two conflicting state custody decisions is valid. Although the PKPA was intended to eliminate custody

---

[21](...continued)

Blanche would not have been able to have brought such litigation in any court without subjecting herself to a possible award of fees under these same state statutes. Likewise, the Tribe should not be able to attempt the same result without exposure to those same fees.

struggles, this Court held that federal courts are not appropriate forums to raise a PKPA claim.[21] Thus, the Tribe could not assert a claim under **§1738A**. This leaves only the Oklahoma and Kansas UCCJA's as pendent state claims. And, of course, the ICWA does not support a transfer to Kansas for any reason.

Even if, as the Tribe claims, **§1738A** is an alternative basis for jurisdiction, it still provides an imperative for an award of fees as this reference to an uncodified section of **Public Law 96-611** makes clear:

> **Section 8(c)** of **Pub.L. 96-611** provided that: "In furtherance of the purposes of **§1738A** of title **28**, United States Code [this section], as added by subsection (a) of this section, State courts are encouraged to--
>
> (1) afford priority to proceedings for custody determinations; and
>
> (2) award to the person entitled to custody or visitation pursuant to a custody determination which is consistent with the provisions of such **§1738A** [this section], *necessary travel expenses, attorneys' fees, costs of private investigations, witness fees or expenses, and other expenses incurred in connection with such custody determination in any case in which--*
>
> (A) a contestant has, without the consent of the person entitled to custody or visitation pursuant to a custody determination which is consistent with the provisions of such **§1738A** [this

---

[21]Nor is it reasonable to conclude **§1738A** supports a claim for pendent jurisdiction because this Court rejected federal courts as a forums under the "domestic relations" exception to federal jurisdiction.

> section], (i) wrongfully removed the child from the physical custody of such person, or (ii) wrongfully retained the child after a visit or other temporary relinquishment of physical custody; or
>
> (B) **the court determines it is appropriate**. (Emphasis added)

Thus, if there is any policy which Congress intended **§1738A** to represent, it would be the encouragement of awards of attorneys fees to parties dragged into inappropriate jurisdictions to litigate jurisdictional requirements long since settled or for which a prior opportunity to litigate was reasonably available and refused.

III. CASE LAW SUPPORTS A FEE AWARD AND RHONDA WAS ENTITLED TO FEES SINCE THE DECISION OF THE TENTH CIRCUIT MET THE TEST OF SUBSTANTIALITY ON A COMMON CORE OF FACTS EVEN THOUGH THE COURT NEVER RULED ON THE MERITS OF COUNT TWO.

The Tenth Circuit's award of fees and costs was consistent with its own decisions and this Court's allowances of fee awards under parallel circumstances. For example, a party who states a substantial federal constitutional claim, but obtains relief instead on an alternative theory of a pendent state claim is nevertheless entitled to attorneys fees. *Plott v. Griffiths*, 938 F.2d 164, 167-8 (10th Cir., 1991)

The basis is that the federal court has jurisdiction to decide the pendent state claim and may probably do so in order to avoid deciding a federal constitutional questions:

A federal court may exercise pendent jurisdiction over a state law claim when the federal claim is of sufficient substance to support federal jurisdiction. *See United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966). A federal claim is insubstantial only if it is "obviously without merit or is wholly frivolous," or "is clearly foreclosed by prior decisions of the Supreme Court." 13B *C. Wright, A. Miller & E. Cooper*, **Federal Practice & Procedure** Sec. 3564, at 68-70 (2d ed., 1984); see also *Hagans v. Lavine*, 415 U.S. 528, 536-39, 94 S.Ct. 1372, 1378-80, 39 L.Ed.2d 577 (1974); *Martinez v. United States Olympic Comm.*, 802 F.2d 1275, 1280 (10th Cir., 1986). When a substantial federal question regarding the constitutionality of a state statute is alleged, therefore, the district court has jurisdiction to decide all state questions in the case, even if the court decides the case on the basis of state law only. *Louisville & N. R.R. v. Garrett*, 231 U.S. 298, 303, 34 S.Ct. 48, 50, 58 L.Ed. 229 (1913); *Siler v. Louisville & N. R.R.*, 213 U.S. 175, 191, 29 S.Ct. 451, 454, 53 L.Ed. 753 (1909). Where a case "can be decided without reference to questions arising under the Federal Constitution, that course is usually pursued and is not departed from without important reasons." *Siler*, 213 U.S. at 193, 29 S.Ct. at 455; accord *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 236, 104 S.Ct. 2321, 2327, 81 L.Ed.2d 186 (1984)("unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided"); *Hagans*, 415 U.S. at 546, 94 S.Ct. at 1383-84 (courts deal first with possibly dispositive state law claims pendent to federal constitutional claims); *City of Cincinnati v. Vester*, 281 U.S. 439, 448-49, 50 S.Ct. 360, 363, 74 L.Ed. 950 (1930)(court will not decide important constitutional questions unnecessarily or hypothetically).

- - - - -

In *Maher v. Gagne*, 448 U.S. 122, 100 S.Ct. 2570, 65 L.Ed.2d 653 (1980), the Supreme Court noted that a plaintiff who prevails on a claim not covered by [**42 U.S.C.** §] section **1988** may nevertheless receive an award of attorney's fees under that section in the following circumstances:

> "In some instances, ... the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the non-constitutional claim is dispositive. *Hagans v. Lavine*, 415 U.S. 528 [94 S.Ct. 1372, 39 L.Ed.2d 577] (1974). In such cases, if the claim for which fees may be awarded meets the 'substantiality' test, see *Hagans v. Lavine*, *supra*; *United Mine Workers v. Gibbs*, 383 U.S. 715 [86 S.Ct. 1130, 16 L.Ed.2d 218] (1966), attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a 'common nucleus of operative fact.' *United Mine Workers v. Gibbs*, *supra*., at 725 [86 S.Ct. at 1138]."
>
> *Id.* at 133 n. 15, 100 S.Ct. at 2576 n. 15.

Federal appellate courts confronted with analogous cases involving constitutional and state law claims have held that, under *Maher*, when a plaintiff raises both a substantial constitutional claim and a pendent state law claim which is closely factually related, and the plaintiff prevails on the state claim, he is entitled to an award of attorney's fees under section **1988** even though the district court does not address the constitutional claim. *See Seaway Drive-In, Inc.*

> *v. Township of Clay*, 791 F.2d 447 (6th Cir.), *cert. den.*, 479 U.S. 884, 107 S.Ct. 274, 93 L.Ed.2d 251 (1986); *McDonald v. Doe*, 748 F.2d 1055, 1056-57 (5th Cir., 1984); *See also Wisconsin Hosp. Ass'n v. Reivitz*, 820 F.2d 863, 869 (7th Cir., 1987). For attorney's fees to be awarded, the constitutional claim must be substantial and both the statutory and constitutional claims must arise out of a common nucleus of operative facts. *Maher*, 448 U.S. at 133 n. 15, 100 S.Ct. at 2576 n. 15; *Seaway Drive-In*, 791 F.2d at 451-52. This test of substantiality is identical to the one described above that the district court must apply to determine whether it has pendent jurisdiction over a state law claim. **See** *Seaway Drive-In*, 791 F.2d at 452. If a constitutional claim is substantial for jurisdictional purposes, therefore, it will also be substantial for attorney's fees purposes. *See id.*
>
> *Plott v. Griffiths*, 938 F.2d 164, 167-8 (10th Cir., 1991)

Although not a perfect fit, this case is still clearly analogous to the instant case and this Court's holdings. Respondent Wahnee meets the test of "substantiality" under a common core of facts. Substantial questions were alleged as state statutory pendent claims, claims which, because of their parallel to the Panel decision would have had virtually identical results in Rhonda's favor had the merits been reached under the pendent state claims.[22]

---

[22]While it is true that neither the Federal district court nor the Tenth Circuit adjudicated Count Two on the merits, the record clearly reflects, contrary to the Tribe's assertions, the district court considered Count Two a separate claim as this excerpt from the docket shows:

(continued...)

The Tribe now claims the case of *F. D. Rich Co. Inc., v. Industrial Lumber Co.*, 417 U.S. 116, 94 S.Ct. 2157, 40 L.Ed.2d 703 (1974) supports the proposition that a prevailing party is not entitled to attorneys fee when they prevail on a federal claim even though state law would permit an award of attorneys fees in analogous circumstances.

Rich is distinguishable on nontrivial grounds from the instant case in several significant ways. **First**, the *Miller Act*, **40 U.S.C.A. §§270a** *et seq.* claim under *Rich* was **the only claim asserted in the district court** because it was an exclusive remedy under either federal or state law.[23] The *Miller Act* did not provide for an award of attorneys' fees to a successful plaintiff. *Rich v. Industrial Lumber*, 417 U.S. at 126.

Thus, there was no alternative basis for an award of fees. California law did not provide for awards of attorneys' fees in suits arising from private construction projects. The Ninth Circuit nonetheless held that since federal law controls *Miller Act* recoveries, it was free to look to "state policy" rather than state law and found an award of attorneys' fees appropriate. As a result, the Ninth Circuit gave the Respondent more protection than California law affords litigants involved in

---

[22](...continued)

7/21/93 26 COURTROOM MINUTES: re oral args on mtn to dism [6-1]; Cnsl apra as noted; court hears args on dft's mtn to dism; **court grants mtn to dism w/respect to the 2nd cause of action**; denies mtn to dism as to the central dispute; if plf's cnsl wishes, supplement to plf's MSJ may be filed w/in 2 weeks; dfts allowed 20 days to respond to MSJ now on file; if plf wishes to reply - must have leave of court (cc: all counsel) (bm) [Entry date 07/23/93](Emphasis added)

[23]As this Court noted, "The federal remedy was intended to substitute for the unavailable state remedy of the lien. . ." *Rich*, 94 S.Ct. at 2163-4.

disputes arising from private construction projects who are not entitled to an award of attorneys' fees. This Court's reversal was a simple application of the American Rule. *Rich v. Industrial Lumber*, 417 U.S. at 127-8.

In the instant case, **there is** a statutory basis for fees, thus *Rich* is no help to Petitioner.

CONCLUSION

The Comanche Tribe had ample opportunity to fully litigate the jurisdictional dispute over custody of Kristy in the State district court, but chose not to complete that process. While **§1914** allows the Tribe to bring a challenge in "a court of competent jurisdiction", that is not a general grant of appellate jurisdictional review by federal courts over state court proceedings that voids the normal requirements of "full faith and credit" of **28 U.S.C. §1738**.

The Tribe also cannot complain that an attorneys fee award was entered by the Tenth Circuit because it invoked state and federal statutes in its original *Complaint* that provided for fee awards in "appropriate" cases. An essential purpose of the *Oklahoma* and *Kansas Uniform Child Custody Jurisdiction Acts* as well as the federal *Parental Kidnapping Prevention Act* was a remedy for jurisdictional disputes over child custody issues which previously were not generally accorded "full faith and credit" from jurisdiction to jurisdiction. That is exactly what happened here. Intervenor Rhonda Wahnee successfully defended a jurisdictional challenge to the State district court proceedings using essentially the same criteria as would otherwise have been controlling under a determination made under the State Acts. In short, the award of fees to Rhonda

was an appropriate exercise by the Tenth Circuit to compensate Rhonda for the inappropriate renewed litigation by the Tribe.

Accordingly, Respondents respectfully request that this Court deny the Tribe's *Petition* to review the decision of the Tenth Circuit.

Respectfully submitted,

MICHEAL SALEM*
Salem Law Offices
111 North Peters, Suite 100
Norman, OK 73069
(405) 366-1234
and
SUSAN BUSSEY
Attorney at Law
900 South Berry Road
Norman, OK 73069
(405) 321-8997

Attorneys for Respondent
Rhonda Wahnee

GUY HURST*
Assistant Attorney General
4545 N. Lincoln Blvd., Suite 260
Oklahoma City, OK 73105
(405) 521-4274

Attorney for Respondents
Richard E. Hovis and the
District Court of Kiowa County

*Counsel of Record

INDEX OF APPENDICES

APPENDIX A - Excerpt of Original *Petition* for juvenile proceeding regarding Kristy Wahnee filed May 6, 1986 in the District Court of Kiowa County, State of Oklahoma

APPENDIX B - Journal Entry - Adjudication dated June 16, 1986 and filed in the District Court of Kiowa County, State of Oklahoma

APPENDIX C - Court Minute dated and filed May 27, 1987 in the Kiowa County District Court

APPENDIX D - Motion to Transfer filed in the District Court of Kiowa County by Comanche Tribe

APPENDIX E - Order to Transfer filed in the District Court of Kiowa County on June 11, 1987

APPENDIX F - Excerpt of Order of Supreme Court of the State of Oklahoma filed September 24, 1991

APPENDIX G - Administrative Order of Comanche Tribal Children's Court dated October 6, 1990 and filed October 15, 1990

APPENDIX H - Text of **28 U.S.C. §1738A**

APPENDIX A

(Excerpt of Original *Petition* for juvenile proceeding regarding Kristy Wahnee filed May 6, 1986 in the District Court of Kiowa County, State of Oklahoma)

In the District Court of Kiowa County, State of Oklahoma

In The Matter of:	)	
	)	
SHANNON WAHNEE	)	No. JFJ-86-12
KRISTY WAHNEE	)	
	)	
Alleged Deprived Children	)	
Under the Age of 18 Years.	)	

PETITION

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF OKALHOMA (sp) AND PURSUANT TO 10 O.S. 1971 §1103(B), comes now Steven S. Suttle, the duly elected, qualified and acting District Attorney for KIOWA County, Oklahoma and gives the Court to know and be informed that Kristy Wahnee is a female child of the age of 3 years born on the 19 day of July, 1982, who was found in this county, whose father is Stuart Barr Wahnee, 906 S.W. 4th, Anadarko, Ok whose mother is Rhonda Greenough/Wahnee, Box 12, Mt. View, OK and the child now resides with Rhonda Greenough/Wahnee of Box 12, Mt. View, OK, County, Oklahoma and is now a deprived child within the meaning of 10 O.S. §1101 et seq. and has come within the purview of those statutes because:

That the child does not have the proper parental care or guardianship in that the mother allows her friend to abuse and mistreat the children

The State prays that the parental rights of Rhonda Greenough/Wahnee in said child be terminated.
That the Court order support payments in the amount of $__ _ per month be paid by _____ to the Department of Human Services through the Court Clerk of Kiowa County for the support and maintenance of said child while in the Department's custody,
That the child be made a ward of this Court and actual custody of this child be given to the Department of Human Services of the State of Oklahoma and other proper relief as the Court may deem necessary.

STEVEN S. SUTTLE, District Attorney

by s/John J. White
Assistant District Attorney

VERIFICATION

I, Stuart Barr Wahnee, do solemnly swear that I have read the above *Petition*, am aware of its contents and do verify that to the best of my information and belief the contents are true and correct.

s/Stuart Wahnee

Signed and sworn to before me this 5th day of May, 1986.
DEANNA BONNER, Court Clerk
s/Deanna Bonner
~~Deputy~~

APPENDIX B

(Journal Entry - Adjudication dated June 16, 1986 and filed in the District Court of Kiowa County, State of Oklahoma)

In the District Court of Kiowa County, State of Oklahoma

In The Matter of:	)	
	)	
SHANNON WAHNEE	)	No. JFJ-86-12
KRISTY WAHNEE	)	
	)	
Alleged Deprived Children	)	
Under the Age of 18 Years.	)	

JOURNAL ENTRY - ADJUDICATION

Now on the 16th day of June, 1986, this cause having been heard on the duly verified petition filed on the 5th day of May, 1986, John J. White, Assistant District Attorney appearing for the petitioner; Charles W. Barker Jr., Attorney, appearing for the children also appearing: the mother with her attorney Nellie Perry and the father and his attorney George TaBone. Whereupon, all parties were advised of their statutory and constitutional rights; and no demand having been made for jury trial, witnesses were sworn and testimony taken.

The Court, after reviewing the files, hearing sworn testimony and being fully advised in the premises, finds:

1) That the Court has jurisdiction of the subject matter and the parties hereto.

2) That the material allegations in the petition are true; that the Court makes the following findings of fact: That the children do not have the proper parental care and has been abused and mistreated while in the mother's care.

3) That the petition should be sustained by reason of testimony.

4) That the children should be made wards of the Court as deprived children.

5) That the Service plans provided by the Department of Human Services and filed herein are proper and must be followed by parents.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THE COURT that the children are hereby made wards of the Court as deprived children.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED BY THE COURT that the temporary custody of the children should be and is placed with the Department of Human Services with authority to consent to any necessary medical treatment, including emergency surgery, which may be required by the children.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED BY THE COURT that the parents must comply with the Service Plans filed herein and these Service Plans are hereby made a part of this Order.

IT IS FURTHER ORDERED THAT this matter be set down for Disposition on the 15th day of October, 1986, at 10:00 A.M. Before the Honorable Lloyd R. Reeder.

s/Lloyd R. Reeder
Lloyd R. Reeder
Judge of the District Court

APPENDIX C

(Court Minute dated and filed May 27, 1987
in the Kiowa County District Court)

In The Matter of:	)	
	)	
SHANNON WAHNEE	)	No. JFJ-86-12
KRISTY WAHNEE	)	
	)	
Alleged deprived children	)	
Under the age of 18 years.	)	

MINUTES

May 27, 1987

Nellie Perry, Attorney for mother, objects to the transfer of this case by the Comanche tribe.

Entered cause comes on before Judge Lloyd R. Reeder for hearing. Lee Ann Davis is Court Reporter. Petitioner appears by John J. White, Assistant District Attorney. Mother is present and represented by Nellie Perry, Court Appointed Attorney. Children are not present but are represented by their Court Appointed Attorney, Charles W. Barker, Jr. Father is present and represented by his Court Appointed Attorney, George Tah-Bone. All parties announce ready for hearing. 2 witnesses sworn. The mother requests visitation; this will be worked out among parties. Court states that the District Attorney's office is to advise the Comanche tribe that they need to make a request to the Court for transfer of this case. Further testimony is taken. Mr. Tah-Bone presents the Journal Entry of Divorce to be made a part of the record. Case is postponed to July 27, 1987 at 10:00 a.m.

APPENDIX D

(Motion to Transfer filed in the District Court of Kiowa County by Comanche Tribe)

DISTRICT COURT IN AND FOR
KIOWA COUNTY
IN THE STATE OF OKLAHOMA

IN THE INTEREST OF:

Shannon James Wahnee	)	No. JFJ-86-12
dob: 04-19-85	)	
Kristy Wahnee	)	
dob: 07-19-82	)	
Comanche minors	)	**MOTION TO TRANSFER**

COMES NOW, this 9 day of June, 1987, the Comanche Tribal Children's Court of the Comanche Indian Tribe, Lawton, Oklahoma, moves the District Court in and for Kiowa County, State of Oklahoma, to transfer the above-styled matter of Shannon James Wahnee and Kristy Wahnee, JFJ-86-12, for the following reasons:

01 That the children are enrolled members of the Comanche Tribe, and,

02 That pursuant to the Indian Child Welfare Act, 25 USC 1911(b) and the Comanche Indian Child Welfare Code, 1-1-5(1), any state court shall transfer to the Comanche Tribal Children's Court any proceeding for the foster care placement of, or termination of parental rights to, any Indian child who is a member of or

eligible for membership in the Comanche Tribe if the Children's Court finds that the transfer would not be detrimental to the best interests of the child, and,

03 That the Comanche Indian Tribe, by the adoption of the Comanche Indian Child Welfare Code, which was approved by the Bureau of Indian Affairs on November 29, 1982, has the proper jurisdiction to request for transfer.

WHEREFORE, movant prays that an Order for Transfer by(sp) issued in the above-styled matter and further, that all court and social records pertaining to the above-styled matter be transferred to the Comanche Tribal Children's Court.

s/Eunice Tosee
Judge, Comanche Tribal Children's Court

APPENDIX E

(Order to Transfer filed in the District Court of Kiowa County on June 11, 1987)

In the District Court of the Third Judicial District of the State of Oklahoma, Sitting within and for Kiowa County

In The Matter of:	)	
	)	
SHANNON WAHNEE	)	
d/o/b 4-19-84	)	
	)	No. JFJ-86-12
KRISTY WAHNEE	)	
d/o/b 7-19-82	)	
	)	
Alleged Deprived Children	)	
Under the Age of 18 Years.	)	

ORDER TO TRANSFER

Now on this the 11th day of June, 1987, the Motion to Transfer the above styled and numbered cause to the Comanche Tribal Children's Court, comes on for hearing.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that the above styled and numbered cause is hereby ordered Transferred to:

Comanche Tribal Children's Court
P. O. Box 908
Lawton, Oklahoma 73502

The Court Clerk of Kiowa County is hereby ordered and directed to transmit forthwith all files, pleadings, instruments and a certified copy of the docket sheets herein to Comanche Tribal Children's Court, Lawton, Oklahoma 73502, provided, however, the original of this Transfer Order shall be maintained in the file of the Clerk of this Court and a Certified copy of such Transfer Order shall accompany the transmittal of the cause as above provided.

DONE on this 11th day of June, 1987.

s/Lloyd R. Reeder

Lloyd R. Reeder
Judge of the District Court

APPENDIX F

(Excerpt of Order of Supreme Court of the State of Oklahoma filed September 24, 1991)

In The Supreme Court of the State of Oklahoma

Tuesday, September 24, 1991

The Clerk is directed to issue the following orders:

* * * * *

77,861 Blanche Wahnee v. Honorable Richard E. Hovis, Judge of the District Court of Kiowa County, State of Oklahoma and Rhonda Wahnee.
Application to assume original jurisdiction denied.
CONCUR: Hodges, V.C.J., Lavender, Simms, Hargrave, Summers, JJ.
DISSENT: Doolin, Kauger, JJ.

Opala, C.J. dissenting, I would treat this case as a timely appeal from the trial court's vacation of transfer order.

* * * * *

(Other orders involving unrelated cases)

APPENDIX G

(Administrative Order of Comanche Tribal Children's Court dated October 6, 1990 and filed October 15, 1990[1])

In the Comanche Tribal Children's Court of
The Comanche Tribe of Oklahoma

In The Interest of:	)	
	)	
KRISTY ANN WAHNEE	)	No. JV-86-9
DOB 07-19-82	)	
	)	
(A) Comanche child(~~ren~~) and	)	
concerning respondent(s):	)	
Stuart Barr Wahnee and	)	**ORDER**
Rhonda Greenough McAdams	)	
Wahnee	)	

Comes now the Comanche Tribal Children's Court on its own motion and issues this administrative order.

After due consideration of the issues and based upon the Court's findings that:

1.0 The Court is without necessary personnel; and,

2.0 Pending such time that operational needs of the Court are met;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

---

[1]The concurrence of the Tribal Chairman was dated October 25, 1990, ten days after the Order was shown filed in the Tribal Children's Court.

1.0 That pursuant to Comanche Indian Child Welfare Code, Article 1, §1-3-13, the Court hereby continues all court cases until further order of the Court;

2.0 All orders previously issued in these cases shall remain in effect until further action of the Court;

3.0 In the event of an emergency, any party may petition for a show-cause hearing to be able to show cause that immediate Court hearing is necessary to protect individual rights under the Comanche Indian Child Welfare Code; and,

4.0 Because of the budgetary constraints and resultant cutbacks in court judicial activity, code mandated time limitations are stayed pending a resumption of full Tribal Court activity.

DATE: October 6, 1990

s/Weckeah Bradley
Judge, Comanche Tribal Children's Court

s/Baldwin Parker, Jr.
Judge, Comanche Tribal Children's Court

s/Eunice Tosee
Judge, Comanche Tribal Children's Court

Comanche Tribal Children's Court
HC 32, Box 1720
Lawton, Oklahoma 73501
AC 405/492-4988 X70

CONCUR s/unreadable DATE: 10-25-90
Chairman
Comanche Nation

APPENDIX H

28 U.S.C. §1738A. Full faith and credit given to child custody determinations

(a) The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsection (f) of this section, any child custody determination made consistently with the provisions of this section by a court of another State.

(b) As used in this section, the term--

(1) "child" means a person under the age of eighteen;

(2) "contestant" means a person, including a parent, who claims a right to custody or visitation of a child;

(3) "custody determination" means a judgment, decree, or other order of a court providing for the custody or visitation of a child, and includes permanent and temporary orders, and initial orders and modifications;

(4) "home State" means the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old, the State in which the child lived from birth with any of such persons. Periods of temporary absence of any of such persons are counted as part of the six-month or other period;

(5) "modification" and "modify" refer to a custody determination which modifies, replaces, supersedes, or otherwise is made subsequent to, a prior custody determination concerning the same child, whether made by the same court or not;

(6) "person acting as a parent" means a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody;

(7) "physical custody" means actual possession and control of a child; and

(8) "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States.

(c) A child custody determination made by a court of a State is consistent with the provisions of this section only if--

(1) such court has jurisdiction under the law of such State; and

(2) one of the following conditions is met:

(A) such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;

(B) (i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such State, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

(C) the child is physically present in such State and (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse;

(D) (i) it appears that no other State would have jurisdiction under subparagraph (A), (B), (C), or (E), or another State has declined to exercise jurisdiction on the ground that the State whose jurisdiction is in issue is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that such court assume jurisdiction; or

(E) the court has continuing jurisdiction pursuant to subsection (d) of this section.

(d) The jurisdiction of a court of a State which has made a child custody determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.

(e) Before a child custody determination is made, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated and any person who has physical custody of a child.

(f) A court of a State may modify a determination of the custody of the same child made by a court of another State, if--

(1) it has jurisdiction to make such a child custody determination; and

(2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination.

(g) A court of a State shall not exercise jurisdiction in any proceeding for a custody determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody determination.